STATE OF MICHIGAN

COURT OF APPEALS

MARJORIE STOUGH, Plaintiff-Appellant,	UNPUBLISHED March 25, 2008
v JETT SETT MANAGEMENT SERVICES, LLC, VIANNE FLOYD, and GENERAL MOTORS CORPORATION, Defendants-Appellees.	No. 274167 Wayne Circuit Court LC No. 05-516304-CD
MARJORIE STOUGH, Plaintiff-Appellant,	
v GENERAL MOTORS CORPORATION, Defendant-Appellee.	No. 275441 Wayne Circuit Court LC No. 05-516304-CD
MARJORIE STOUGH, Plaintiff-Appellant,	
v JETT SETT MANAGEMENT SERVICES, LLC, and VIANNE FLOYD, Defendant-Appellee.	No. 276618 Wayne Circuit Court LC No. 05-516304-CD

Before: Beckering, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

These consolidated cases arise out of plaintiff's claim of age discrimination. In Docket No. 274167, plaintiff Marjorie Stough appeals as of right the October 17, 2006 order granting

summary disposition in favor of defendants. In Docket No. 275441, plaintiff appeals the December 15, 2006 order awarding sanctions to defendant General Motors Corporation (GM). In Docket No. 276618, plaintiff appeals the February 8, 2007 order awarding sanctions to defendants Jett Sett Management Services, LLC (Jett Sett) and Vianne Floyd. We affirm the orders granting summary disposition to defendants and awarding case evaluation sanctions to GM. The order awarding case evaluation sanctions to Jett Sett and Floyd is affirmed in part and reversed in part.

Before 1992, GM directly hired flight attendants for its corporate flight operations. GM hired plaintiff as a flight attendant in 1989 when she was 41 years old. In 1992, however, GM outsourced its flight attendant services to Signature Flight Support Services (Signature). Signature subsequently hired all of GM's former flight attendants, including plaintiff and Floyd. Floyd began preparing the flight attendants' schedules when she was promoted to lead flight attendant in 1997. In 1998, Signature hired flight attendants Julie Furmancyzk, age 28 or 29, and Karen Chamberlein, age 31 or 32, at Floyd's recommendation.

In February of 2002, GM awarded the flight attendant services contract to Jett Sett, a company owned and operated by Floyd since 1997. Jett Sett subsequently hired Furmancyzk, Chamberlein, and plaintiff to work as part-time, contract flight attendants. At the time, plaintiff was 54 years old. Floyd testified that she voluntarily hired these flight attendants and that they voluntarily accepted employment with Jett Sett. Jett Sett hired flight attendants Anita White, age 38, and Gabrielle Wright, age 44, in 2002, and flight attendants Sonia Bazzi, age 37, and Deborah Weiss, age 42, in 2003.

Plaintiff testified that when she signed her service contract with Jett Sett in 2002 she understood that she was not employed by GM. The first provision of the service contract provided: "Contractor acknowledges and understands that the relationship between himself/herself and [Jett Sett's] Corporate Clients is not as an employee and all concerns and comments must be directed to Jett Sett's Management and not the Clients. Failure to comply will result in termination." Similarly, a purchase order negotiated between GM and Jett Sett provided that, "[Jett Sett's] personnel shall in no event be considered employees of [GM]; [Jett Sett] will remain responsible for all wages, taxes, benefits, payroll deductions, remittances and other obligations with respect to its personnel."

Like GM and Signature, Jett Sett scheduled flight attendants based on their availability. Flight attendants were required to submit a schedule of availability to Floyd by the 15th of each month and provide at least 15 days of availability for the ensuing month. Floyd distributed a copy of the master schedule to all of the flight attendants each month. Beginning in March of 2003, however, Floyd began giving each attendant copies of only their own schedule. Floyd attributed this change to constant complaining from the flight attendants about their schedules. Upon instituting the change, Floyd sent all of the flight attendants a letter informing them that, "[if] I get wind that any of you are using the schedule to compare with each other, I will either remove you from the schedule and/or terminate your relationship with Jett Sett."

Since 1988, plaintiff has volunteered as a flight attendant for Nomads, an air travel club. In the fall of 2004, plaintiff went on an "around-the-world" trip with Nomads. Plaintiff did not submit a schedule of availability for December before leaving on the trip. When plaintiff returned from the trip on November 22, she informed Floyd that she was available to work in

December if any flights "popped up." Floyd indicated that there were no open flights in December, but asked that plaintiff attend a training session on December 8. When plaintiff arrived at the training on the 8th, she checked the master schedule. Furmancyzk, Chamberlein, Wright, and Floyd were scheduled for flights; plaintiff, Bazzi, and Weiss were not. Floyd testified that she saw plaintiff looking at the master schedule, she told plaintiff that "there was nothing there for her to look at," and then plaintiff looked at the schedule again.

After the training, plaintiff complained to Floyd about the December schedule. Floyd informed plaintiff that she scheduled Furmancyzk, Chamberlein, and Wright because they provided her with availability first. Plaintiff then complained to Kevin Miller, GM's Manager of Executive Travel Services, about the schedule. Floyd testified that she heard plaintiff complaining in Miller's office. When Floyd entered the office, Miller stated that he would not involve himself in a dispute over the flight attendants' schedules and that Floyd had the right to run her company as she saw fit. Immediately after their discussion, Floyd terminated plaintiff's employment. Plaintiff was 57 years old.

When asked why she terminated plaintiff, Floyd testified, in part:

> I terminated Marjorie because of insubordination. Margie never adhered to the rules and regulations of Jett Sett, and that was that if you have any problems, any concerns regarding employment, personal concerns, any concerns at all, that you needed to direct it to the flight attendant manager of Jett Sett. . . . . Margie was terminated because that day she had some issues with the schedule, and she did not come to me, she went to the client manager, which is against what Jett Sett's policy says. She knows it, everybody knows it, but Margie refused to acknowledge that, acknowledge me as her boss, acknowledge me as being the company that she worked for, and she just ignored that, and that is something that I am not going to tolerate from any employee.
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> Margie was terminated for insubordination. Any other issues that are predicated under that, I could have – I've worked with the flight attendants through their complaints. All of them complained and I've worked with them. . . . . But as far as going to the client, I am not going to tolerate that. That is something that protects my company and protects my client.

When asked whether "insubordination" included looking at the master flight schedule, Floyd replied, in part:

> If Margie needed to know what the schedule says . . . Margie could have come to me, and I corrected Margie once when I saw her looking at the schedule. I told her that there was nothing there for her to look at. She left. When I turned my back, she came back and looked at the schedule again. If that's not insubordination, I don't know what is.

After her termination, plaintiff filed a complaint against defendants, alleging age discrimination in violation of the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq*. After

the completion of discovery, defendants filed successful motions for summary disposition. Defendants then moved for case evaluation sanctions. The trial court granted GM's motion for sanctions, but requested a more detailed list of the expenditures and services requested as sanctions by Jett Sett and Floyd. After Jett Sett and Floyd submitted an addendum to their motion for sanctions, the trial court granted the motion.

I

Plaintiff argues that the trial court erred in granting summary disposition in favor of defendants. We disagree. We review a trial court's decision on a motion for summary disposition de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, we consider all of the evidence submitted by the parties in the light most favorable to the non-moving party. *Id*. at 119-120. Summary disposition should be granted only where the evidence fails to establish a genuine issue regarding any material fact. *Id*. at 120. The non-moving party may not rely on mere allegations or denials, but must go beyond the pleadings to set forth specific facts showing a genuine issue of fact for trial. *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).

A.

First, plaintiff argues that the trial court erred in granting summary disposition to Jett Sett and Floyd with regard to her claim of age discrimination. The CRA prohibits employment discrimination based on age. MCL 37.2202(1)(a); *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 358; 597 NW2d 250 (1999). Plaintiff bases her discrimination claim on alleged disparate treatment. "Disparate treatment" is another name for a claim of intentional discrimination, *Meagher v Wayne State Univ*, 222 Mich App 700, 709; 565 NW2d 401 (1997), and may be proved by either direct or circumstantial evidence, *Sniecinski v BCBSM*, 469 Mich 124, 132; 666 NW2d 186 (2003). Here, plaintiff relies on indirect or circumstantial evidence, arguing that employees younger than herself were treated more favorably and were not terminated despite committing the same alleged misconduct. In cases such as this, that involve indirect or circumstantial evidence, the plaintiff must proceed by using the burden-shifting approach utilized in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Sniecinski, supra* at 133-134. Under this approach, the plaintiff can present a rebuttable prima facie case of discrimination based on evidence from which a trier of fact could infer that the plaintiff was the victim of unlawful discrimination. *Id*. at 134.

To establish a rebuttable prima facie case of discrimination under the CRA, the plaintiff must prove that: (1) she belonged to or was a member of a protected class; (2) she suffered an adverse employment action; (3) she was qualified for the position; and (4) she suffered the adverse employment action, such as discharge, under circumstances giving rise to an inference of unlawful discrimination. *Id*.; *Lytle v Malady*, 458 Mich 153, 172-173; 579 NW2d 906 (1998). In the context of age discrimination, Michigan courts have sometimes stated the fourth prong of this *McDonnell Douglas* framework differently, purporting to require evidence that the plaintiff "was replaced by a younger person." *Lytle, supra* at 177. See also *Matras v Amoco Oil Co*, 424 Mich 675, 683; 385 NW2d 586 (1986); *Kerns v Dura Mechanical Components, Inc*, 242 Mich App 1, 12; 618 NW2d 56 (2000). Although evidence of replacement by a younger worker is

perhaps the most common way of establishing the fourth prong, it is also sufficient for a plaintiff to present proof that the defendant treated her differently than persons of a different age class who engaged in the same or similar conduct. *Town v Michigan Bell Tel Co*, 455 Mich 688, 695; 568 NW2d 64 (1997); *Meagher*, *supra* at 716.

In this case, the first three prongs of the *McDonnell Douglas* framework, i.e., that plaintiff was in a protected class, that she was terminated, and that she was qualified for the position, are undisputed. The question here is whether plaintiff can establish the fourth prong of the framework, i.e., that she was terminated under circumstances giving rise to an inference of unlawful discrimination based on her age. Plaintiff alleges that she has satisfied the fourth prong with evidence of replacement by a younger worker. The record reflects that Jett Sett hired flight attendant Dawn Rodriguez, who is approximately 18 years younger than plaintiff, within 7 weeks of plaintiff's termination. Considering this evidence in the light most favorable to plaintiff, we find that plaintiff presented sufficient evidence to establish a prima facie case of age discrimination.

The fact that plaintiff established a prima facie case of discrimination does not, however, automatically preclude summary disposition in defendants' favor. *Hazle v Ford Motor Co*, 464 Mich 456, 463-464; 628 NW2d 515 (2001). After a plaintiff makes a prima facie showing of discrimination, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the plaintiff's termination. *Lytle*, *supra* at 173. Once the defendant produces such evidence, the plaintiff must demonstrate that the employer's proffered reasons were not true reasons, but were a mere pretext for discrimination. *Id*. at 174. A plaintiff can establish that a defendant's reasons for termination were pretextual "(1) by showing the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision." *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990).

Here, defendants' proffered nondiscriminatory reason for plaintiff's termination was violation of Jett Sett policy. Plaintiff does not dispute that she violated company policy by failing to provide the required 15 days per month of availability, using the master flight schedule to compare her schedule to those of other flight attendants, and, more importantly, complaining to GM personnel about her schedule. Nonetheless, plaintiff claims that defendants were motivated to fire her because of her age; not her policy violations.

Plaintiff relies on numerous theories to demonstrate that defendants' proffered reason for terminating her was pretextual. First, plaintiff argues that defendants have engaged "in a pattern of discharge of the older flight attendants in favor of younger flight attendants." In so arguing, plaintiff relies on evidence that, between 1998 and 2002, Floyd hired Furmancyzk and Chamberlein, and then discharged "senior" flight attendants Kathy Laper, Roberta Lack, Sherri Scalfani, and Kristin Ericson. We note, however, that during this period of time, Signature was responsible for providing GM's flight attendant services, not Jett Sett. In fact, Laper, Lack, Scalfani, and Ericson never worked for Jett Sett, a company that is a completely separate legal

entity from both GM and Signature. Therefore, we decline to consider plaintiff's arguments regarding that period of time.[1]

Additionally, plaintiff argues that defendants did not terminate younger flight attendants despite their lack of availability. There is evidence that, like plaintiff, younger flight attendants failed to provide Jett Sett with the required 15 days of availability each month. For example, Chamberlein, who is approximately 19 years younger than plaintiff, was placed on probation in 2005 for lack of availability, but she was not fired. But White, who is approximately 16 years younger than plaintiff, was fired *before* plaintiff for lack of availability. Furthermore, Floyd repeatedly testified that her primary reason for terminating plaintiff was for insubordination and, more specifically, for violating Jett Sett policy by complaining to GM personnel. This is evidenced by the fact that Floyd fired plaintiff immediately after plaintiff complained to Miller.

Plaintiff further argues that younger flight attendants were not terminated even after complaining to GM personnel. GM employees William Henderson and Thomas Bauer both testified that they received complaints from flight attendants about their schedules. But, neither Henderson nor Bauer could give any specific examples of flight attendants other than plaintiff complaining to them, and plaintiff admitted that she was not aware of any other flight attendants who complained. Moreover, Floyd testified that she was unaware of any Jett Sett flight attendants other than plaintiff who complained to GM personnel, and plaintiff has presented no evidence indicating that Floyd was so aware. Bearing this in mind, it is impossible for plaintiff to establish that Floyd treated younger flight attendants who complained to GM personnel differently than she treated plaintiff.

Plaintiff also argues that Floyd gave the younger flight attendants more favorable schedules than the older flight attendants. The record reflects, however, that in every year that plaintiff worked for Jett Sett, she was assigned *more* flights than younger flight attendants. In 2002 and 2003, she was assigned more flights than Wright, White, and Bazzi, and in 2004, she was assigned more flights than Weiss, Bazzi, and Floyd. Although plaintiff was assigned fewer flights than Furmancyzk and Chamberlein, they provided Floyd with greater availability than plaintiff. Plaintiff admitted that she did know whether the other flight attendants provided more

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[1] Even if we considered plaintiff's argument, we are unpersuaded by her theory that defendants engaged in a "pattern of discharge of the older flight attendants in favor of younger flight attendants." The record reflects that Laper and Lack were discharged for lack of availability and reluctance to conform to Signature's policies; Scalfani, who is approximately 17 years *younger* than plaintiff, was discharged because of an immigration issue; and Ericson was discharged because she suffered from anxiety and declined a different position with Signature. While Laper and Ericson testified that their ages might have played a part in their terminations, their assertions were purely speculative. Scalfani testified that before Floyd fired Laper, Floyd said that GM employee Ken Emmerick gave her permission to "get rid of the old flight attendants." Although the statement may have been admissible at trial as an admission by a party opponent, MRE 801, Scalfani admitted that she was not present when Emmerick made the alleged statement and that she did not know what Emmerick meant by the phrase "old flight attendants." Furthermore, Floyd testified that she did not remember ever making such a statement to Scalfani.

availability than she did. She also admitted that she was scheduled for more flights and that her income nearly doubled after she started working for Jett Sett.

The only other evidence used by plaintiff to demonstrate that defendants' proffered reason for terminating her was pretextual is that GM personnel referred to the flight attendants as "the 'old' girls and the 'young' girls," that they called the younger flight attendants "Barbie dolls," and that Floyd once asked plaintiff to "dress like [Wright]," who was wearing a short, tight skirt and high heels. Plaintiff suggests that she was terminated because she was not considered to be one of the "'young' girls," or the "Barbie dolls." But, plaintiff's subjective belief that she was discriminated against because of her age is insufficient to create a genuine issue of material fact concerning whether defendants were motivated by age animus in terminating her. See *Hazle*, *supra* at 476-477.

Furthermore, it is particularly noteworthy that Floyd hired plaintiff, on behalf of Jett Sett, when plaintiff was *54* years old, although she was under no obligation to do so, and then fired her less than three years later. It is well-settled that "in cases where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer." *Town*, *supra* at 700 (quotations and citations omitted). Consequently, we find that the trial court properly granted summary disposition in favor of defendants.

Jett Sett and Floyd argue that, even if plaintiff prevailed on her claim of age discrimination, she failed to establish Floyd's individual liability. Defendants gave only cursory treatment to this issue in their brief on appeal, with no citation to relevant authority. "It is not sufficient for a party simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) (quotations and citations omitted). Failure to properly address the merits of an assertion constitutes abandonment of the issue. *Thompson v Thompson*, 261 Mich App 353, 356; 683 NW2d 250 (2004).

Moreover, defendants' implication that an officer of a corporation cannot be held individually liable on a claim of employment discrimination is without merit. Though not usually referred to as a tort, "discrimination claims have always been characterized as a species of statutory tort," *Mack v Detroit*, 467 Mich 186, 194 n 6; 649 NW2d 47 (2002), superseded on other grounds by MCL 600.2912(e), and it is well-settled that "agents and officers of a corporation are liable for torts which they personally commit, even though in doing so they act for the corporation, and even though the corporation is also liable for the tort," *Warren Tool Co v Stephenson*, 11 Mich App 274, 300; 161 NW2d 133 (1968). Furthermore, this Court recently found that under the CRA, an agent of an employing entity "can be held directly and individually liable if he engaged in discriminatory behavior in violation of the CRA while acting in his capacity as the victim's employer." *Elezovic v Bennett*, 274 Mich App 1, 15; 731 NW2d 452 (2007). Therefore, if Floyd had participated in discrimination in violation of the CRA, she could be held individually liable.

Jett Sett and Floyd also argue that plaintiff's discrimination claim was preempted by 49 USC 41713(b)(1) of the Airline Deregulation Act (ADA). We disagree. The ADA preempts all

state laws or regulations that are "related to a price, route, or service of any air carrier that may provide air transportation." 49 USC 41713(b)(1). This Court has found that while the ADA should be broadly interpreted, it should not "be interpreted in such a broad and extensive manner as to completely shelter airlines from a state action by an employee who has allegedly been discriminated against by the airline in no connection whatsoever to the services it provides." *Gilman v Northwest Airlines, Inc*, 230 Mich App 293, 297; 583 NW2d 536 (1998). State actions that affect airline services in only a tenuous, remote, or peripheral manner are not preempted. *Id*. at 297-298, citing *Morales v Trans World Airlines, Inc*, 504 US 374, 390; 112 S Ct 2031; 119 L Ed 2d 157 (1992). In this case, plaintiff's age discrimination claim is not related to Jett Setts' services, as opposed to a claim based on eyesight or physical size which are arguably connected to safety, and is not preempted by the ADA. See *Gilman*, *supra* at 303-304; *Fitzpatrick v Simmons Airlines, Inc*, 218 Mich App 689, 692; 555 NW2d 479 (1996).

Further, Jett Sett and Floyd argue that because the cause of plaintiff's termination was previously decided in connection with her claim for unemployment benefits, relitigation of that issue is precluded under the doctrines of res judicata and collateral estoppel. Again, we disagree. In *Storey v Meijer, Inc*, 431 Mich 368; 429 NW2d 169 (1988), our Supreme Court considered the application of collateral estoppel to the decisions of the Michigan Employment Security Commission (MESC). The Court found that MCL 421.11(b)(1) "clearly and unambiguously prohibits the use of MESC . . . determinations in subsequent civil proceedings unless the MESC is a party or complainant in the action," and that application of collateral estoppel to MESC determinations would contravene public policy considerations that support expeditious and nonadversarial unemployment proceedings. *Id*. at 376-377. Accordingly, the Court held that MESC determinations "are limited to the purpose of determining a claimant's eligibility for benefits." *Id*. at 379. More recently, this Court extended the Court's reasoning in *Storey*, *supra*, to the context of workers' compensation benefits, stating that "res judicata and collateral estoppel are to be qualified or rejected when their application would contravene a substantial public policy. If employers fear that judicial estoppel will preclude them from defending subsequent discrimination and harassment suits . . . , they may be increasingly unwilling to concede any liability in worker's compensation proceedings, even when they might otherwise be inclined to do so." *Horn v Dep't of Corrections*, 216 Mich App 58, 64; 548 NW2d 660 (1996) (citation omitted). Pursuant to our Supreme Court's holding in *Storey*, *supra*, and this Court's reasoning in *Horn*, *supra*, defendants' res judicata and collateral estoppel argument must fail.

B.

Next, plaintiff argues that the trial court erred in granting summary disposition with regard to her claim of liability against GM. Because plaintiff failed to establish a genuine issue of material fact with respect to her age discrimination claim, we need not consider plaintiff's arguments regarding GM's liability. We will, however, briefly address the issue.

Plaintiff argues that GM is liable for committing age discrimination as an employer under the CRA. We disagree. MCL 37.2202(1)(a) prohibits an employer from using a classification protected by the CRA: to "discriminate against an individual with respect to . . . a term, condition, or privilege of employment." Further, our Supreme Court held in *McClements v Ford Motor Co*, 473 Mich 373, 387; 702 NW2d 166 (2005), that "an employer can be held liable under the CRA for discriminatory acts against a nonemployee if the nonemployee can

demonstrate that the employer affected or controlled the terms, conditions, or privileges of the nonemployee's employment."

In this case, the purchase order negotiated between GM and Jett Sett provided that Jett Sett personnel were not employees of GM and that Jett Sett was responsible for all "wages, taxes, benefits, payroll deductions, remittances and other obligations with respect to its personnel." Both Miller and Floyd testified that GM had no control over the scheduling, hiring, or firing of Jett Sett flight attendants. Furthermore, while plaintiff, Scalfani, and Ericson testified that they assumed GM personnel had the authority to fire flight attendants, they admitted that they had no evidence to support that assumption. Plaintiff further admitted that Floyd handled Jett Sett's day-to-day operations and that she received her paychecks and flight schedules directly from Jett Sett. We find, based on this evidence, that plaintiff failed to present a genuine issue of material fact with regard to GM's liability as an employer under the CRA. There is insufficient evidence to prove that GM had the requisite control over "the terms, conditions, or privileges" of plaintiff's employment to be held so liable.

Alternatively, plaintiff argues that GM is liable for Floyd's acts of discrimination because Floyd acted as its agent. Again, we disagree. "The test of whether an agency has been created is whether the principal has a right to control the actions of the agent." *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992). In *Anspach v Livonia*, 140 Mich App 403; 364 NW2d 336 (1985), the plaintiff brought an action against a district court judge and the City of Livonia, alleging that she was not hired as a court officer because of her sex. *Id*. at 405-406. This Court found that the City of Livonia could not be held liable under an agency theory of liability because it did not "have the responsibility or authority to hire court employees or personnel." *Id*. at 409. Here, GM had no control over who Jett Sett hired or fired. Therefore, plaintiff's claim must fail.

C.

GM argues that the trial court properly dismissed plaintiff's conspiracy claim and that plaintiff has abandoned the issue on appeal. Plaintiff did not address this issue in her response to defendants' motions for summary disposition or during oral arguments before the trial court. Nor did plaintiff raise the issue on appeal to this Court. Because the issue has not been properly presented for appellate review, we decline to address it. MCR 7.212(C)(7); *Silver Creek Twp v Corso*, 246 Mich App 94, 99-100; 631 NW2d 346 (2001).

II

Plaintiff also challenges the trial court's award of sanctions to defendants. A party who rejects a case evaluation award, and then fails to improve its position at trial, is generally required to pay the opposing party's actual costs. MCR 2.403(O)(1); *Dessart v Burak*, 470 Mich 37, 40; 678 NW2d 615 (2004). "Actual costs" include the costs taxable in any civil action, and a reasonable attorney fee based on a reasonable hourly or daily rate. MCR 2.403(O)(6); *Campbell v Sullins*, 257 Mich App 179, 198; 667 NW2d 887 (2003).

A trial court's decision regarding a motion for case evaluation sanctions presents a question of law that we review de novo. *Id*. at 197. The interpretation and application of court rules is also a question of law reviewed de novo on appeal. *Dessart, supra* at 39; *Campbell*,

supra at 198. We review the amount of sanctions imposed by the trial court for an abuse of discretion. *Campbell*, *supra* at 197. An abuse of discretion occurs when the trial court's decision falls outside of the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

A.

First, plaintiff challenges the trial court's award of sanctions to GM. Plaintiff argues that the trial court erred in awarding GM costs for depositions filed after summary disposition was granted. We disagree.

MCL 600.2549 provides that costs for certain depositions may be allowed in the taxation of costs. It states that:

> Reasonable and actual fees paid for depositions of witnesses filed in any clerk's office and for the certified copies of documents or papers recorded or filed in any public office shall be allowed in the taxation of costs only if, at the trial or when damages were assessed, the depositions were read in evidence, except for impeachment purposes, or the documents or papers were necessarily used.

Plaintiff asserts that in order to recover costs for depositions under MCL 600.2549, the depositions must be filed before a "decision is made to summarily dismiss the case." We note, however, that while the plain language of MCL 600.2549 requires that the depositions be "filed in any clerk's office," it does not require that the depositions be filed by a particular time. See *Portelli v IR Constr Prods Co, Inc*, 218 Mich App 591, 607; 554 NW2d 591 (1996) (holding that MCL 600.2549 plainly states that depositions must be filed in a clerk's office). The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature, *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006), and the first criterion in determining intent is the specific language of the statute, *People v Lively*, 470 Mich 248, 253; 680 NW2d 878 (2004). If the plain and ordinary meaning of the language is clear, judicial construction is normally neither necessary nor permitted. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005). Provisions not included in the statute by the Legislature should not be included by the courts. *Polkton Twp v Pellegrom*, 265 Mich App 88, 103; 693 NW2d 170 (2005).

Here, the trial court awarded GM costs for 12 depositions used in connection with its motion for summary disposition. GM attached excerpts of the depositions to its motion for summary disposition. Therefore, the depositions were "necessarily used" by the trial court, as required by MCL 600.2549. See *Portelli*, *supra* at 605-606 (holding that attaching excerpts of depositions to a motion for summary disposition fulfills the "necessarily used" requirement of MCL 600.2549). GM filed complete copies of the transcripts in the clerk's office after its motion for summary disposition was granted. Because the plain and unambiguous language of MCL 600.2549 does not require that the depositions be filed in a clerk's office by a particular time, we find that the trial court properly awarded GM costs for the depositions.

Additionally, plaintiff argues that the trial court abused its discretion in awarding GM an unreasonable amount of attorney fees for time spent drafting a reply brief in support of its motion for summary disposition and preparing for oral argument on the motion. Again, we disagree.

In evaluating the reasonableness of an attorney fee, the trial court should consider relevant criteria, including "the professional standing and experience of the attorney; the skill, time and labor involved; the amount in question and the results achieved; the difficulty of the case; the expenses incurred; and the nature and length of the professional relationship with the client." *Zdrojewski v Murphy*, 254 Mich App 50, 72; 657 NW2d 721 (2002); *Temple v Kelel Distributing Co, Inc*, 183 Mich App 326, 333; 454 NW2d 610 (1990); *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973). The trial court is not required to render detailed findings on the factors considered. *Campbell, supra* at 199. This Court has held that a trial court does not abuse its discretion in determining a reasonable attorney fee where the defendants provide affidavits of defense counsel and itemized billing statements. *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464, 488-489; 652 NW2d 503 (2002), overruled on other grounds *Elezovic v Ford Motor Co*, 472 Mich 408; 697 NW2d 851 (2005).

Along with its motion for case evaluation sanctions, GM filed a brief, the affidavit of its counsel, and a summary of the attorney hours spent on the case. GM's counsel spent at least 19.3 hours drafting GM's reply brief and at least 7.7 hours preparing for oral argument. Following oral arguments on the motion, the trial court stated that it reviewed all of the documentation submitted by GM, that it appeared to be "in order," and that the expenses incurred were "reasonable within the law." There is no evidence in the record demonstrating that the hours billed by GM's counsel were excessive. To the contrary, GM filed a seven-page reply brief in support of its motion for sanctions, highlighting numerous misstatements of both fact and law in plaintiff's response brief, and presented a successful oral argument on the motion. Even on appeal plaintiff has failed to present any evidence, other than her own subjective beliefs, that the hours billed by GM's counsel were unreasonable. Accordingly, we find that the trial court properly exercised its discretion in determining the reasonableness of the requested fees.

B.

Next, plaintiff challenges the trial court's award of sanctions to Jett Sett and Floyd. Plaintiff argues that the trial court erred in awarding Jett Sett and Floyd attorney fees for work done before the expiration of the 28-day period for acceptance or rejection of the case evaluation award. We agree.

MCR 2.403(L)(1) states that a party must file a written acceptance or rejection of the case evaluation award within 28 days after service of the panel's evaluation. A party's decision regarding the evaluation cannot be disclosed until the expiration of the 28-day reply period, at which time the alternative dispute resolution (ADR) clerk sends notice to the parties indicating each party's decision. MCR 2.403(L)(2). A party who rejects the evaluation, and does not receive a more favorable verdict than the evaluation, must pay the opposing party's attorney fees necessitated by the rejection of the evaluation. MCR 2.403(O)(1), (6). Attorney fees incurred before the deadline for accepting or rejecting the evaluation, however, are not taxable as costs because "a party cannot know whether the opposing party's decision will require preparation for a trial" prior to that time. *Taylor v Anesthesia Assoc of Muskegon, PC*, 179 Mich App 384, 386; 445 NW2d 525 (1989). That is, "it is logically inescapable that any attorney fees incurred prior to that time are not 'necessitated by the rejection of the mediation evaluation.'" *Id*. at 386-387.

In this case, the case evaluation took place on June 26, 2006 and, pursuant to MCR 2.403(L)(1), the parties had until July 24, 2006 to accept or reject the evaluation. Nonetheless,

the trial court awarded Jett Sett and Floyd attorney fees for work conducted between July 1, 2006 and July 24, 2006. Jett Sett and Floyd argue that because plaintiff informed them that she was rejecting the evaluation at the beginning of the 28-day reply period, the reply period became irrelevant for purposes of calculating case evaluation sanctions and the trial court's award of attorney fees was proper.[2] We disagree. In *Taylor, supra*, this Court warned against such a holding, stating in relevant part:

> Although defendants in this case rejected the evaluation long before the expiration of the twenty-eight-day period provided by MCR 2.403(L)(1), thereby assuring a trial regardless of what plaintiffs decided to do, the focus properly remains on plaintiffs' decision because they are the ones who are penalized for their rejection . . . . From defendants' perspective, plaintiffs' decision was not ascertainable until the day after the expiration of the twenty-eight-day period for acceptance or rejection of the mediation evaluation. MCR 2.403(L)(2). Thus, that day serves as the starting point for measuring those attorney fees subject to reimbursement . . . . Moreover, if we were to reach a contrary result on the theory that defendant, by prematurely rejecting the evaluation, assured a trial and that, consequently, any fees expended after its early decision to reject were "necessitated by the rejection of the mediation award," this holding would have the improvident side effect of giving incentive to parties to file their rejections as soon as possible within the twenty-eight-day period in order to assure that all subsequent efforts expended on that case would be subject to reimbursement as mediation sanctions in the event of a favorable outcome at trial. [*Taylor, supra* at 387 n 1.]

Based on this Court's reasoning in *Taylor*, we find that attorney fees incurred before the end of the 28-day reply period should not be taxable as costs, regardless whether one of the parties expressed an intention to reject the evaluation before the end of the period. Accordingly, we reverse the portion of the trial court's order awarding Jett Sett and Floyd attorney fees incurred during the 28-day reply period.

Plaintiff next argues that the trial court abused its discretion in awarding Jett Sett and Floyd attorney fees for preparing an addendum to their motion for case evaluation sanctions.

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[2] Alternatively, Jett Sett and Floyd argue that plaintiff "invited" any error by voluntarily informing them that she was rejecting the evaluation and that she should be "estopped from complaining about [their] reliance upon her truthful representations." But, Jett Sett and Floyd's reliance on the doctrines of invited error and judicial estoppel is misplaced. Under the doctrine of invited error, a party is foreclosed from raising as error on appeal any action or decision that the party successfully advocated below. See *In re Smebak*, 160 Mich App 122, 129; 408 NW2d 117 (1987). Under the doctrine of judicial estoppel, a party who successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding. *Paschke v Retool Indus*, 445 Mich 502, 509; 519 NW2d 441 (1994). As plaintiff correctly asserts, there is no authority indicating that either of these doctrines should be applied to statements made by a party "off the record," as is the case here.

According to plaintiff, Jett Sett and Floyd should not be awarded fees necessitated by their counsel's "failure" to submit an itemized list of actual costs with their initial motion for sanctions. We disagree. Contrary to plaintiff's argument, the court rules do not require a party seeking case evaluation sanctions to specify the amount of actual costs with particularity. *Young v Nandi*, 276 Mich App 67, 88; 740 NW2d 508 (2007). The party need only submit enough evidence to establish what services were necessitated by the rejection of the case evaluation. *Id*. at 88-90. Here, Jett Sett and Floyd attached a billing statement summarizing the attorney services performed along with their initial motion for sanctions. At the December 2006 hearing on the motion, the trial court requested a *more detailed* billing statement. Jett Sett and Floyd complied with the request and, following a second hearing, the court granted their motion. The decision to award case evaluation sanctions for services associated with post-trial motions is within the discretion of the trial court, *Troyanowski v Kent City*, 175 Mich App 217, 226-227; 437 NW2d 266 (1988), and we affirm the trial court's decision to do so in this case.

Plaintiff also argues that the trial court erred in awarding Jett Sett and Floyd various expenses billed as costs of litigation. Plaintiff specifically challenges the court's award of $623.00 for photocopying and $32.94 for postage. We agree with plaintiff that photocopying and postage expenses are not taxable costs. Under MCR 2.403(O)(1), "actual costs" are awardable as case evaluation sanctions. MCR 2.403(O)(6) defines "actual costs" as those costs taxable in any civil action and a reasonable attorney fee. Taxation of costs is governed by Chapter 24 of the Revised Judicature Act, MCL 600.2401 *et seq*., and photocopying and postage expenses are not provided for by the statute. Accordingly, while the time spent by an attorney on such activities may be awardable as attorney fees, the expense items incurred are not awardable as taxable costs. Therefore, we reverse the trial court's award of costs for photocopying and postage.

Additionally, plaintiff argues that the trial court abused its discretion in awarding Jett Sett and Floyd attorney fees based on an unreasonable hourly rate. We disagree.

As indicated above, to determine a reasonable hourly or daily rate, the trial court should consider relevant criteria, including "the professional standing and experience of the attorney; the skill, time and labor involved; the amount in question and the results achieved; the difficulty of the case; the expenses incurred; and the nature and length of the professional relationship with the client." *Zdrojewski*, *supra* at 72; *Temple*, *supra* at 333; *Crawley*, *supra* at 737. Additionally, the trial court may utilize the empirical data contained in the Law Practice Survey or other reliable studies or surveys. *Temple*, *supra* at 333. This Court has found, however, that "a trial court is in the best position to assess an attorney's contribution to a case because trial courts are aware of the strengths and weaknesses of cases before them, the time and effort expended by the attorneys, and changes in the parties' leverage resulting from changes in counsel (e.g., due to attorneys' skill or reputation)." *Reynolds v Polen*, 222 Mich App 20, 30; 564 NW2d 467 (1997).

In this case, the trial court found $350 per hour to be a reasonable rate for attorney Arthur Weiss. In granting Jett Sett and Floyd's motion for sanctions, the trial court indicated that it reviewed all of the documentation submitted with their motion and the addendum to the motion, and that all of the fees requested were reasonable given the nature of the case. In an affidavit attached to Jett Sett and Floyd's reply brief in support of their motion for sanctions and again at oral arguments, Weiss stated that he had practiced law for more than 30 years and that he

specialized in complex litigation. This was a challenging case, involving complex issues and the testimony of numerous witnesses, and the outcome was favorable to Jett Sett and Floyd.

Plaintiff's only argument in support of her position is that the hourly rate awarded by the trial court exceeds the rate awarded in cases in the same locality, and that there is no published case law supporting an award of $350 per hour. There is ample evidence, however, that courts of this state have consistently awarded experienced attorneys in the Detroit-area between $300 and $450 per hour. See, e.g., *Taylor v Currie*, 277 Mich App 85, 103-104; 743 NW2d 571 (2007) (affirming a Wayne Circuit Court award of $375 per hour in an election law case); *Jundy v Detroit*, unpublished opinion per curiam of the Court of Appeals, issued March 29, 2007 (Docket No. 264039) (affirming a Wayne Circuit Court award of $300 per hour in a trespass and trespass nuisance case); *Smith v Khouri*, unpublished opinion per curiam of the Court of Appeals, issued November 16, 2006 (Docket No. 262139), lv granted in part 479 Mich 852 (2007) (affirming an Oakland Circuit Court award of $450 per hour in a dental malpractice case); *Petrella v Petrella*, unpublished opinion per curiam of the Court of Appeals, issued April 25, 2000 (Docket No. 214222) (affirming an Oakland Circuit Court award of $300 per hour in a divorce case).

Bearing in mind that a trial court is in the best position to assess an attorney's contribution to a case and that courts of this state have consistently awarded experienced attorneys in the Detroit-area between $300 and $450 per hour, we affirm the trial court's award of $350 per hour in this case. The trial court awarded an hourly rate within the range of reasonable and principled outcomes and, therefore, did not abuse its discretion.

C.

Finally, plaintiff argues that the trial court erred in failing to hold evidentiary hearings to determine the reasonableness of the attorney fees requested by defendants. A trial court should hold an evidentiary hearing when a party challenges the reasonableness of the attorney fees claimed. *Jager*, *supra* at 488. An evidentiary hearing is not required, however, if the parties created a sufficient record to review the issue. *Id*. We find, for the reasons indicated above, that the evidence of record was sufficient to support the trial court's findings on the reasonableness of the attorney fees requested. Therefore, plaintiff's request that we remand for an evidentiary hearing is denied.

We affirm the trial court orders granting summary disposition in favor of defendants and awarding case evaluation sanctions to GM. The order awarding case evaluation sanctions to Jett Sett and Floyd is affirmed in part and reversed in part. We remand for entry of an order consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ David H. Sawyer
/s/ Karen M. Fort Hood